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SENSITIVE
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STATE PASS USTR FOR JGROVES AND DWEINER
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E.O. 12958: N/A
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SUBJECT: SPECIAL 301 REVIEW: SPAIN

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MADRID 00000224 001.2 OF 006

SENSITIVE BUT UNCLASSIFIED - PLEASE PROTECT ACCORDINGLY

SUMMARY AND RECOMMENDATION

1. (SBU) Spain was placed on the Special 301 Watch List in April 2008 primarily due to the government's failure to take specific, concrete measures to address a growing Internet piracy problem. One year later, Internet piracy continues to grow. The government is attempting to address the problem in several ways - most notably by pressing for results in negotiations between Internet Service Providers (ISPs) and rights-holders on measures to prevent unauthorized downloads. Because it does not want to take potentially controversial action without the agreement of both parties, the government has not yet initiated any legislative or regulatory measures to combat digital piracy, pending the conclusion of negotiations. The government has taken a number of other steps to discourage piracy and raise public awareness. In November 2008, the Minister of Culture introduced the government's third anti-piracy public awareness campaign in the past four years. In the same month, the Ministry of Industry, Tourism, and Trade hosted its second annual conference on IPR in the digital environment, which featured a USG speaker. Rights-holder groups praised the release by a GOS inter-agency group of an IPR good practices manual that includes guidance on investigating and prosecuting IPR crimes. Notably, the manual emphasizes that unauthorized peer-to-peer (P2P) downloads are always illegal.

2. (SBU) The government is not investigating or prosecuting cases of file-sharing or P2P downloading, due in large part to the 2006 Circular of the Fiscalía (Prosecutor General's Office) stating that such activity should not be subject to criminal prosecution but rather treated as a civil violation. In civil proceedings, investigators are unable to obtain identifying information from ISPs, making the civil route unproductive; the government may seek to address this problem once negotiations are completed. Post is not aware of any efforts by the government to modify the Circular despite our efforts. Separately, the Business Software Alliance reports

strong cooperation on the part of the GOS, and Microsoft says software piracy levels declined in 2008. Rights-holders praise the ongoing work of the National Police and Civil Guard in combating street piracy at the national level but note that Internet piracy is now a more important problem. Separately, police actions against informal street sellers have come under growing public criticism, and a movement to decriminalize such street sales has garnered media and Congressional attention.

¶3. (SBU) Recommendation: As described above, the GOS is acting against piracy in a number of significant ways. However, most observers agree that Internet piracy will continue to flourish until the ISPs and the GOS agree to regulatory and possibly legislative actions. Post believes the private-sector negotiations will eventually produce an agreement that the government will then assist in implementing, but it is not clear whether this will happen in the next few months. For this reason, post recommends keeping Spain on the Watch List. End Summary and Recommendation.

¶4. (SBU) Intellectual property rights policy in Spain is the province of the Ministry of Industry, Tourism, and Trade and the Ministry of Culture. The Ministry of Interior (which oversees the National Police and Civil Guard) and the Ministry of Justice (of which the Fiscalia is an independent branch) are responsible for enforcement. Within the Ministry of Industry, Tourism, and Trade, the Office of Patents and Trademarks manages industrial property issues and receives high marks from industry representatives for its professionalism. The Ministry of Culture has the lead on copyright issues in tandem with the Ministry of Industry, Tourism, and Trade's Secretariat of State for Telecommunications and the Information Society. The Minister

MADRID 00000224 002.2 OF 006

of Culture chairs an Inter-Sectoral Committee created in 2005 to implement the national anti-piracy plan and has been perhaps the most visible public figure speaking in defense of improving Spain's IPR enforcement. Rights-holders give the Ministry of Culture credit for his understanding of the problem and strong desire to fix it, but lament the Ministry's lack of resources and clout. The government has not centralized coordination of the fight against Internet piracy; however, a lack of coordination is less an issue than deficiencies in the legal regime.

INTERNET PIRACY - GOVERNMENT PUSHES PRIVATE SECTOR NEGOTIATIONS

¶5. (SBU) At the urging of the Ministry of Industry, Tourism, and Trade, Redtel, the association comprising Spain's four largest ISPs (Telefonica, Orange, Vodaphone, Ono), began in May 2008 to meet with the Anti-Piracy Coalition, which represents the film, music, and video games industries and copyright management societies, to discuss ways to combat internet piracy. After extensive discussions and exchanges of information, it was not until late September that Redtel made its initial proposal for the creation of a new government commission to hear complaints of digital copyright infringement and send notifications to alleged violators. Content providers deemed Redtel's proposal problematic in various respects - cumbersome, potentially unworkable, not far-reaching enough - and had concerns as well about the cost burdens, but accepted it as a basis for further discussions. The parties have continued to meet, and all agree the talks are serious and are advancing, albeit slowly and with occasional steps back. The Minister of Industry, Tourism, and Trade, Miguel Sebastian, called for the parties to present to the government by December 31 a document listing their areas of agreement and disagreement, but they failed to meet this deadline. The new target date is the first week of March, at which time the government hopes to make a public announcement.

¶6. (SBU) Rights-holders groups advise that any decision reached by that date will be general in nature, with many details remaining to be worked out. The two sides and their lawyers are reportedly far apart on the legal measures that will be required to implement any such agreement, with the content providers arguing that a Ministerial decree may be sufficient while the ISPs have suggested that four or five laws may need to be amended, a process that would take at least two years and probably longer. Progress on adopting a framework to make some content legally available online has been mixed, with the Redtel pushing hard for access to more music and especially films than the rights-holders are prepared to make available. While rights-holders frequently complain about the slow pace of negotiations and about Redtel's tactics, and several have at one time or another threatened to pull out, the parties appear interested in reaching agreement, though the early March deadline may be unrealistic. The GOS would prefer that the two sides reach agreement on as many aspects as possible, and one official has privately expressed concern that they may put forward two different proposals, requiring the government to act as broker.

¶7. (SBU) It should be noted that differing priorities and interests among the rights-holders' groups that comprise the Coalition have complicated the negotiations. The music and film industries, for example, are at odds over Redtel's insistence that penalties for repeat offenders will not include suspension or cancellation of Internet services. The Music Producers of Spain contend that the threat to cut off repeat violators must be an option, even if rarely exercised, for the system to work. The Motion Picture Association and its local allies believe there are alternative sanctions, such as a significant reduction in bandwidth, that would be sufficient to deter recidivists.

¶8. (SBU) The government, for its part, has pushed the parties to continue to negotiate and has promised to assist in implementing any agreement once the parties agree on what regulatory/legislative changes are needed. It remains reluctant to propose any legislative or regulatory measures that are not fully supported by the private sector, believing that any such initiatives would be unpopular and unlikely to succeed. As a result, several legal obstacles to effective IPR protection that the USG has urged the government to

MADRID 00000224 003.2 OF 006

modify - e.g., the "actual knowledge" standard for ISP liability, the prohibition against identifying alleged infringers in the context of civil litigation - remain in place. The government says it has prepared a number of possible legislative proposals, depending on what service providers and rights-holders agree to. The government, like most rights-holders, is hopeful that relatively few, modest legal changes may be sufficient.

¶9. (SBU) Industry figures show that between July 2007 and June 2008, there were 1.9 billion music downloads, of which 4 percent were from legal, paid services, and 250,000 film downloads, of which 2 percent were legal and paid. Cynics among the rights-holders assert that the government's posture actually gives the ISPs an incentive to negotiate slowly, since an agreement could trigger government actions that the service providers would prefer to delay as long as possible. In pushing the parties to reach agreement, the government has threatened to impose its own solution if negotiations fail but is clearly reluctant to take such a step, and the parties know it. The government, all agree, wants Telefonica and the other telecommunications companies that own the ISPs to voluntarily make some concessions - especially, to agree to a graduated response regime modeled on some combination of British and French approaches to the problem - in order to spare the government from having to take politically unpopular measures unilaterally. However, the ISPs, eager to avoid customer resentment, stress that they will do whatever government requires through law or regulation, but only

because they are required to do so. Telefonica, as part of its corporate social responsibility programs, participates in a prominent anti-piracy public education campaign. However, a company spokesperson recently told mass circulation daily El Pais that Telefonica is "neither judge nor party" in the controversy over file-sharing and P2P downloads and that it "will do whatever our regulator says when a decision is made" but is otherwise totally neutral on Internet piracy questions.

SIGNS OF LEGISLATIVE SUPPORT

¶10. (U) On November 5, the Congress of Deputies issued a non-binding resolution urging the government to "promote an effective strategy, approved by consensus, to fight activities in the digital environment that violate intellectual property rights, based on agreement among all sectors involved: the content industry, internet operators, consumers, and users." The government was not involved in the development of this resolution, but took it as a positive sign that, once the private parties agree on a way forward, there will be support in the Congress for enabling legislation. A Ministry of Culture representative told Econoffs February 25 that Congress's Culture Committee had issued a resolution calling for a panel of experts to draft revisions to the Intellectual Property law, but post has no further information.

GOS PUBLIC AWARENESS ACTIVITIES

¶11. (U) The GOS considers public opinion to be a key battleground in the struggle against all forms of IPR piracy, and public education and awareness to be critical elements in protecting digital content. All observers agree that many Spaniards still do not view online piracy as a problem or even as an offense. Due in part to the Fiscalia's 2006 Circular, some believe peer-to-peer downloading is akin to making a private copy of a digital file and is thus permitted. Others simply can't understand how there could be an issue over such an easy, convenient, unimpeded act. Yet others see such downloading, though considered "wrong" by some, as a form of Robin Hood activity, stealing from wealthy artists, entertainers, and companies.

¶12. (U) The government has undertaken a number of activities in the past year to promote responsible Internet use and to discourage piracy. The Ministry of Industry, Tourism, and Trade organized an International Conference on Digital Content (FICOD) in late November, with a separate conference involving many of the same participants on Protecting IPR in the Digital Environment. The Minister, Miguel Sebastian, spoke at FICOD, and the Secretary of State for Telecommunications, Francisco Ros, at the IPR Conference. Both underscored the need for stronger IPR protection if the sector is to grow, and highlighted the government's commitment to combating digital piracy. Also in late

MADRID 00000224 004.2 OF 006

November, Minister of Culture Cesar Antonio Molina launched the government's third anti-piracy public education campaign, aimed especially at young people, with the slogan, "If you're legal, you're all right." The campaign and Minister Molina's public statements that the GOS would soon be publishing new regulations to protect digital content sparked expressions of concern among Spain's vocal pro-piracy Internet users' lobby, though both their effort to have Molina fired and a pro-piracy demonstration fizzled. The Culture Ministry is planning to launch another public awareness campaign after the current one ends at the end of March and is also organizing seminars on subjects related to IPR protection. The Ministry of Industry, Tourism, and Trade, meanwhile, will begin on March 31 a campaign with the Business Software Alliance and a Spanish industry group to promote use of legal software.

13 (U) Another important GOS initiative was the December 11 launch of a new "Manual of Good Practices" prepared by a broad inter-agency group coordinated by the Ministry of Culture. The Manual is a general reference on IPR issues combined with guidelines and practical suggestions on how to recognize potentially infringing activity, conduct investigations, and prepare cases to be brought before judges. Rights-holders' groups hailed the Manual as establishing "approved criteria" for investigating and prosecuting IPR crime. In its section on Investigations, the Manual describes the phenomenon of P2P downloads and underscores that, when done without the content owner's authorization, such downloads are always illegal and, in contrast with the Fiscalia's Circular, characterizes as "erroneous" any notion that they might constitute permitted private copying.

THE CIRCULAR REMAINS UNCHANGED

¶14. (SBU) One major issue that rights-holders unanimously cite as the main obstacle to effective online IPR enforcement is the 2006 "Circular" issued by the Fiscalia. The Circular, a 115-page document consisting of instructions to prosecutors, was an attempt to incorporate into practice the 2003 IPR amendments to the Penal Code, which among other things made IPR violations a public crime subject to ex officio action by authorities rather than an offense requiring a private complaint. Numerous experts have praised the Circular as a significant advance for the protection of IPR, especially industrial property (patents and trademarks). At the same time, there is near universal agreement that its treatment of Internet piracy, especially P2P file-sharing and downloading, constitutes a combination of misunderstanding, dubious interpretation, and misguided policy. The Circular states that while websites that make available links to protected material are clearly not engaged in making a "private copy" as permitted under the so-called "Digital Canon," an Internet user who downloads from such a link or from a P2P network is in fact making a private copy. In addition, the Fiscalia redefines "profit motive," identified by the Penal Code as a prerequisite for prosecuting IPR-infringing activity as a crime, to mean "commercial profit motive" and specifies that infringing activity must be of commercial scale to constitute a crime. As such, no individual who downloads protected material can be criminally prosecuted, and those who make it available can be prosecuted only if they charge for the service, or, in theory, if they promote the availability of the material on their websites as a means of selling advertising.

¶15. (SBU) The Fiscalia's argument for treating illicit downloads and file-sharing as a civil, rather than as a criminal, offense, was twofold: That criminalizing all IPR-infringing activity as well as a broad cross-section of society that uses Internet technologies would violate the principle of "minimal intervention" by law enforcement (in other words, we can't prosecute half the population); and that criminal prosecution should be reserved for serious offenses and that illicit downloading represents a minor offense which can more appropriately be addressed in the civil courts. The Circular has been interpreted by many Internet users, as well as by many police, prosecutors, and judges, as declaring P2P downloading to be a permitted activity that is no business of law enforcement. Some judges have rejected criminal charges against infringing website

MADRID 00000224 005.2 OF 006

operators based on the Circular's reasoning.

¶16. (SBU) A Fiscalia official with whom post met recently repeated the GOS argument that the Circular is not binding on judges nor a statement of what the law is or is not, but rather a series of instructions designed to help orient prosecutors in their handling of IPR cases. At the same time, she argued that the Circular was legally correct in its reflection of the Penal Code's "profit motive" requirement.

If police decline to open criminal investigations against internet IPR violators, and prosecutors decline to press charges, they are correctly interpreting the Circular's intent. However, it is not the Fiscalía's fault, she stressed, if some people misinterpret the Circular to mean that P2P downloading and file-sharing are permitted, legally sanctioned activities. Nor can the Fiscalía be blamed for the fact that civil cases for Internet piracy tend to run aground on the Data Protection Law, which imposes a high threshold for identifying users according to the Internet Protocol addresses. Those who don't like the Circular's assignment of P2P to civil jurisdiction, she suggested, should focus on either amending the Penal Code or improving civil procedure. The Fiscalía has not considered issuing any sort of modification or clarification of the Circular, she said. Nor, as far as post has been able to determine, has anyone in the government made a serious effort to convince it to do so, despite our efforts. However, if private-sector negotiations produce an effective system of dissuasive measures, the Circular will likely become less of an issue.

SOFTWARE PIRACY DECLINING

¶17. The Business Software Alliance (BSA) is not a member of the Anti-Piracy Coalition. While BSA reports significant piracy problems, including on the Internet, it also enjoys strong and constructive relations with the government. Microsoft recently published a report citing GOS action against piracy and stating that software piracy rates declined in 2008 from their 2007 levels.

ADVANCES AGAINST STREET PIRACY

¶18. (U) Rights-holders and government representatives all agree that law enforcement has done a good job of enforcing IPR laws against the sale of pirated and counterfeit goods. The National Police and the Civil Guard have conducted numerous investigations, resulting in a number of raids on street markets, of which the most significant were in June and November. While statistics are not yet available for 2008, preliminary estimates indicate that authorities conducted at least 40 IPR enforcement actions resulting in more than 300 arrests and the seizures of at least 26 million euros worth of pirated or counterfeit merchandise. In addition, last month the National Police seized 1,150 unauthorized copying and modification devices that enable video games to be uploaded to portable Nintendo consoles. Rights-holders note that coordination between national and local law enforcement varies from one city to another across Spain and tends to depend on relations between national government representatives and municipal governments, which may in turn depend on the political orientation of Mayors and city councils. Catalonia is one region where the coordination is reported to be especially good, whereas representatives of the music industry cited Granada in the south as an example of a city where street piracy remains a problem due to poor coordination between national and local law enforcement. Another problem cited by rights-holders is a lack of proactivity on the part of some public prosecutors in investigating and prosecuting offending vendors and an unwillingness on the part of some judges to levy fines and jail sentences. In addition, one content providers' association head complained that police still require his organization to defray the costs of transporting and storing seized material. That said, everyone we talked to agreed that authorities have continued to increase and improve their enforcement efforts against street piracy over the past year.

¶19. (U) Many, however, expressed concern over a new movement to decriminalize "top manta," the practice of selling pirated videos, CDs, video games, and other portable contraband displayed on sheets or blankets which can quickly be folded and gathered up to conceal the merchandise when police approach. Police arrested approximately 700 "manteros" or

blanket people in 2008, and some 62 are in jail after being convicted of IPR violations. A few recording artists have lent their names to a campaign calling for leniency for arrested manteros and for a change in the law. One judge on Spain's Audiencia Nacional (High Court) has characterized top manta (which is generally conducted by immigrants from Africa) as "a minority business by the poor and for the poor" and referred to enforcement efforts against it as "criminalizing poverty." Some even argue that street sales of pirated goods are insignificant because music, films, and games can be obtained so much more easily over the Internet. The campaign to decriminalize "top manta" has gained sympathetic media coverage in recent weeks and has come to legislators' attention. On February 13, a group of Congressmen from small, left-wing parties from Catalonia introduced in the Justice Committee a resolution calling on the government to decriminalize blanket sales. Although GOS officials say they will oppose this initiative, rights-holders are concerned that an adverse climate of public opinion may demoralize police and lead to a diminution of enforcement actions.

EMBASSY IPR ACTIVITIES

¶20. (U) At the suggestion of Minister of Industry, Tourism, and Trade Sebastian following Spain's placement on the Watch List, Embassy set up a bilateral IPR working group with representatives of the Ministry of Industry, Tourism, and Trade and the Ministry of Culture. The group has met several times to assess progress on the USG's recommendations and on ways to improve Spain's IPR performance. The Ambassador met twice with Minister Sebastian and once with Minister of Culture Molina to advocate a more activist approach to combating piracy. Both the outgoing and incoming DCMs discussed our IPR concerns with Secretary of State for Telecommunications and the Information Society Francisco Ros.

USPTO attorney-advisor Michael Shapiro was a presenter on two panels at the November IPR/Digital conference; during his visit, DCM hosted a lunch for representatives of the government, the Anti-Piracy Coalition, and Redtel. Econoff meets regularly with rights-holders, service providers, and government officials to highlight USG's interest in the success of negotiations and the promulgation of effective legislation.

COMMENT

¶21. (SBU) Post believes the many GOS actions to discourage piracy are significant, and that the GOS-promoted negotiations between rights-holders and ISPs are likely to identify measures that will reduce Internet piracy. For these reasons, post does not recommend placing Spain on the Priority Watch List. However, until ISPs and rights-holders reach agreement and the GOS begins to take the necessary implementing actions, we see no argument for removing Spain from the Watch List.

¶22. (SBU) We believe the year ahead offers important opportunities for us to press the GOS to take definitive steps forward. The government is increasingly sensitive to its international image in the run-up to its assumption of the EU Presidency in January 2010. It is also eager to strengthen and expand bilateral engagement with the new U.S. Administration, and hopes for high-level visits and meetings.

In this context, the government is aware that Spain's continuing Internet piracy problem hurts overall relations. We need to find additional ways to use this sentiment to our advantage. End Comment.

CHACON